Supreme Court, U.S.
FILED

98 156 JUL 23 1998

OFFICE OF THE CLERK

No._____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ROBERT MORRIS,
Petitioner,

V.

COOPER STEVEDORING COMPANY AND
INSURANCE COMPANY OF AMERICA,
Respondent.

**Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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28pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the Fifth Circuit err in failing to hear and address Petitioner's Appeal, Dismissing the matter for want of jurisdiction when his Petitioner for Review was filed within 60 days of the Order of the Benefits Review Board denying the Motion for Reconsideration.

2. Did the Fifth Circuit err in granting Respondent's Motion to Dismiss when Petitioner followed the procedures outlined and attached to the Order from the Benefits Review Board, and also followed the procedures set forth in the C.F.R. §802.407(a) with respect to perfecting his appeal from the Benefits Review Board to the U.S. Court of Appeals for the Fifth Circuit.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to the Petition was not reported. The copies of the decision is reprinted in Appendix A hereto ("App. A") Page A-1.

The Order of the United States Court of Appeals for the Fifth Circuit denying Petitioner's Motion for Rehearing in April 27, 1998. It is reprinted in Appendix B hereto ("App.B") at page B-1.

JURISDICTION

Petitioner seeks review of the United States Court of Appeals for Fifth Circuit's decision filed on March 18, 1998. In that decision, the Fifth Circuit granted Respondent's Motion to Dismiss. Petitioner timely filed his Petitioner for Rehearing, and the Fifth Circuit denied Petitioner's Request for Rehearing on the April 27, 1998. Pursuant to Supreme Court rule 13.1, this Petition has been filed within 90 days of the entry of judgement.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUES AND CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

Notice from the Clerk of the Benefits Review Board dated September 12, 1996 with Notice of Appeal Rights attached is reprinted in Appendix C hereto ("App.C") at page C1-C5.

Order of the Benefits Review Board dated October 22, 1996 denying the request for reconsideration (with Notice of Appeal Rights) is reprinted in Appendix D hereto ("App. D") at page D1-D5.

33 U.S.C. § 921, the text of which is reprinted in Appendix E hereto ("App.E") at page E1-E2.

20 C.F.R. §8-2.407 (e) is reprinted in Appendix F hereto (App.F") at page F-1.

I. STATEMENT OF THE CASE

Petitioner submits that a timely Motion for Reconsideration was filed with respect to the notice from the Clerk of the Benefits Review Board dated September 12, 1996. By Order of the Benefits Review Board issued on October 22, 1996, Petitioner's Motion for Reconsideration was denied by the Benefits Review Board. Thereafter, Petitioner/Claimant timely filed his Petition for Review to the U.S. Supreme Court of Appeals for the Fifth Circuit. The Petition was filed within 60 days of the Order of the Benefits Review Board denying the Motion for Reconsideration.

Respondent's filed a Motion to dismiss for Want of Jurisdiction and the Honorable Fifth Circuit Court of Appeals issued the Order of March 18, 1998 granting the Motion

Petitioner subsequently and timely filed his Petition for Rehearing with the Fifth Circuit Court of Appeals respectfully submitting to the Court that the Court erred and/or made a mistake with respect to the granting of Respondent's Motion to Dismiss. Along these lines, Petitioner stressed that he followed the procedures outlined and attached to the Order from the Benefits Review Board, and also followed the procedures of §802.407(a) with respect to perfecting his appeal to the Fifth Circuit Court of Appeals. The Fifth Circuit denied the Petition for Rehearing on April 27, 1998.

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II. ARGUMENT

A. The Fifth Circuit erred in failing to hear and address Petitioner's Appeal by dismissing the matter for want of jurisdiction when his Petition for Review was filed with 60 days of the Order of the Benefits Review Board denying the Motion for Reconsideration.

As previously indicated, Petitioner perfected his appeal to the Benefits Review Board and thereafter, on September 12, 1996 the Clerk of the Benefits Review Board and thereafter, on September 12, 1996 the Clerk of the Benefits Review Board issued a Notice of Public Law-104-134 (See Appendix C attached).

As per Appendix C, attached to the Notice from the Clerk was an outline of the procedures. As stated at the top of the page "Notice of Appeal Rights", which further states:

> "A Decision of the Benefits Review Board shall become final sixty (60) days after its issuance unless a written petition for review is filed with the appropriate United States Court of Appeals **prior** to the expiration of the sixty (60) day period, **or** unless a timely request for reconsideration if filed with the Board. 33 U.S.C. Section 921; 30 U.S.C. Section 932(a); 20 C.F.R. SECTIONS 802.406, 802.407. Therefore, you are advised that you may SEEK RECONSIDERATION OR, APPEAL, a final decision of the Board within the time limits set forth below. THE TIME LIMITS CANNOT BE EXTENDED, AND YOU MUST SUBMIT YOUR REQUEST TO THE PROPER PLACE WITHIN THE TIME PROVIDED.

LE COPY

> "If you seek RECONSIDERATION by this Board (that is, if you want the Board to reconsider its decision), you must submit to the Board a written Motion for Reconsideration within **30 DAYS OF THE DATE STAMPED ON THE FRONT OF THIS DECISION**. Your motion should identify any error you find in the Board's opinion and state the reasons you believe warrant further consideration of your case. If you file a timely motion for reconsideration, you will have sixty (60) days from issuance of the Board's opinion and state the reasons you believe warrant further consideration of your case. If you file a timely motion for reconsideration, you will have sixty (60 days from the issuance of the Board's decision on reconsideration to file an appeal with a Court of Appeals, as set forth below.
>
> "Alternatively, if you wish to APPEAL to the United States Court of Appeals, you must insure that a petition for review is received by **THE APPROPRIATE COURT (NOT THIS BOARD) WITHIN SIXTY (60) DAYS OF THE DATE STAMPED ON THE FRONT OF THIS DECISION...**"

Petitioner followed the procedures as set forth in the Notice, and as per 20 C.F.R. § 802.407(a).

Thus, a timely Motion for Reconsideration of the Board's Order was made by Petitioner/Claimant herein. By Order issued on October 22, 1996, the Board acknowledged receipt of Claimant's Motion Requesting Reconsideration. The Order further denied the Motion and further stated that: "Further review of this determination, if desired, if properly sought by obtaining review with the appropriate U.S. Court of Appeals" (See # 16 in Supplemental record and as attached hereto).

Thereafter, on December 16, 1996 (within 60 days), Petitioner filed with the Fifth Circuit Court of Appeals a Petition for Review of the Benefits Review Board's Order. Such appeal was timely in accordance with the attachments to the Board's Order outlining the procedures for appeal, and was filed in accordance with and within the time limits as set forth by 20 C.F.R. 802.407(a), which states

> "(a) any party-in-interest may, within 30 days from the filing of the decision for non-interlocutory order by the Board pursuant to Section 802.403(b) request reconsideration of such decision by those members who rendered the decision..."

Again, Petitioner followed the procedures attached to the Order of the Board dated September 12, 1996 and followed the procedural rules with respect to the timely filing of a Motion for Reconsideration, and the timely filing of a Petition for Review in the U.S. Court of Appeals for the Fifth Circuit.

There was no mention in the Notice of the Clerk with respect to the Order of the Benefits Review of Board dated September 12, 1996 that indicated that Motions for Reconsiderations would not be entertained, or any such similar language. To the contrary, the attachment to the Notice specifically sets forth that Claimant could directly file his Notice of Appeal could be filed with the U.S. Court of Appeals or timely request a Reconsideration with this Board.

Again, according to the Notice of Appeal rights and as per 20 C.F.R. 802.407(a) a timely Motion for Reconsideration was filed with the Clerk of the Court. Thereafter, when the Motion for Reconsideration was denied, Petitioner timely filed his Petition for Review which was received by this Honorable Court prior to the expiration of

sixty days from the Order Denying his Request for Reconsideration, as allowed by law.

Thus, it is respectfully submitted that the Honorable United States Court of Appeals for the Fifth Circuit erred in failing to hear and address Petitioner's Appeal by granting Respondents' Motion to Dismiss, as Petitioner's Petition for Review was filed within sixty days (60) of the final order of the Benefits Review Board denying the Motion for Reconsideration and Petitioner followed the requisite procedures as indicated above.

III. CONCLUSION

The Court should accept review of the Fifth Circuit decision because the lower court erred in failing to hear and address Petitioner's Appeal as Petitioner clearly followed all of the proper appeal procedures resulting in the timely filing of his Petition for Review with the lower court.

Respectfully submitted this _____ day of July, 1998.

Respectfully submitted,
LAW OFFICE OF DENNIS L. BROWN

_____

MIKE N. COKINS
State Bar No. 04527500
24 Greenway Plaza, Ste. 1818
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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60854

U.S. Court of Appeals
FILED
MAR 18 1998
CHARLES R. FULBRUGE III
CLERK

ROBERT C MORRIS
Petitioner

v.

COOPER STEVEDORING COMPANY; DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; INSURANCE COMPANY OF NORTH AMERICA
Respondents

Petition for Review of an Order of the
Benefits Review Board

Before DUHÉ, DeMOSS, and DENNIS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that respondents' motion to dismiss appeal for lack of jurisdiction is GRANTED.

/s/ illegible

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60854

U.S. COURT OF APPEALS
FILED
APR 27 1998
CHARLES R. FULBRUGE III
CLERK

ROBERT C MORRIS
Petitioner

v.

COOPER STEVEDORING COMPANY; DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR; INSURANCE COMPANY OF NORTH AMERICA
Respondents

Petition for Review of an Order of the
Benefits Review Board

Before DUHÉ, DeMOSS, and DENNIS, Circuit Judges.

BY THE COURT:

IT IS ORDERED that petitioner's motion for reconsideration of the court's March 18, 1998, order is DENIED.

/s/ illegible

APPENDIX C

U.S. DEPARTMENT OF LABOR
Benefits Review Board
900 K Street N.W.
Washington,D.C. 2001-8001

Re: Robert C. Morris v. Cooper Stevedoring Company, The Insurance Company of America (Case No. 83-LHCA-2933) (OWCP No. 08-0065149) (BRB No. 95-1161)

NOTICE FROM THE CLERK OF THE BENEFITS REVIEW BOARD

Pursuant to the provisions of Public Law 104-134 (Omnibus Appropriations for Fiscal Year 1996), enacted on April 16, 1996, appeals from decisions under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.*, which have been pending before the Benefits Review Board for more than one year, shall, if not acted upon before September 12, 1996, be considered affirmed by the Board and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeal.

According to our records, the appeal in the instant case has now been pending at the Benefits Review Board for more than one year. Therefore, consistent with Public Law 104-134, this decision pending review by the Benefits Review Board is considered affirmed and shall be considered the final order of the Board for purposes of obtaining review in the United States courts of appeal. Attached please find an outline of the procedures for appealing to the courts of appeal.

DATE: SEP 12 1996

Sincerely

/s/ Thomas O. Shepherd, Jr./P.F.
Clerk of the Board

CERTIFICATE OF SERVICE

95-1161 Robert C. Morris v. Cooper Stevedoring Company, The Insurance Company of America (Case No. 83-LHCA-2933) (OWCP No. 08-0065149)

I certify that the parties below were served this day.

SEP 12 1996 /s/ Thomas O. Shepherd, Jr./P.F.
(DATE) Thomas O. Shepherd, Jr.
Clerk of the Board

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HOUSTON, TX 77017
-Certified

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HOUSTON,TX 77061
-Certified

Michael A. Varner, Esq.
Brown,Sims, Wise & White
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21st Floor
HOUSTON,TX 77056
-Certified

Ms Carol A. DeDeo,Esq.
Associate Solicitor
U.S. Department of Labor
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Suite S-325
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-Certified

Mr. Chris John Gleasman
District Director
OWCP-Longshore Division
2600 North Featherwood Drive
Suite 105
CHAMPIONS, TX 77034

Judge Everette E. Thomas
U.S. Department of Labor
Office of Administrative Law Judges
Heritage Plaza Building
5th Floor
111 Veteran's Memorial Boulevard
METAIRIE, LA 70005

Judge Kerry Anzalone
U.S. Department of Labor
Office of Administrative Law Judges
111 Veterans Memorial Blvd
Suite 530
METAIRIE, LA 70005

NOTICE OF APPEAL RIGHTS

A Decision of the Benefits Review Board shall become final sixty (60) days after its issuance unless a written petition for review is filed with the appropriate United States Court of Appeals **prior** to the expiration of the sixty (60) day period, or unless a timely request for reconsideration is filed with the Board. 33 U.S.C. Section 921; 30 U.S.C. Section 932(a); 20 C.F.R. Sections 802.406, 802.407. Therefore, you are advised that you may SEEK RECONSIDERATION, **OR** APPEAL, a final decision of the Board within the time limits set forth below. THE TIME LIMITS CANNOT BE EXTENDED, AND YOU MUST SUBMIT YOUR REQUEST TO THE PROPER PLACE WITHIN THE TIME PROVIDED.

If you seek RECONSIDERATION by this Board (that is, if you want the Board to reconsider its decision), you must submit to the Board a written Motion of Reconsideration with **30 DAYS OF THE DATE STAMPED ON THE FRONT OF THIS DECISION.** Your motion should identify any error you find in the Board's opinion and state the reasons you believe warrant further consideration of your case. If you file a timely motion for reconsideration, you will have sixty (60) days from issuance of the Board's decision on reconsideration to file an appeal with a Court of Appeals, as set forth below.

Alternatively, if you wish to APPEAL to a United States Court of Appeals, you must insure that a petition for review is received by THE APPROPRIATE COURT (NOT THIS BOARD) WITHIN SIXTY (60) DAYS OF THE DATE STAMPED ON THE FRONT OF THIS DECISION. The petition for review should contain the case number and the date of the Board's decision. The petition should be sent to the Court of Appeals which covers the state in which the

employee's injury occurred. In a black lung claim, any state in which the miner had coal mine employment may be considered the state in which the injury occurred (i.e., for a black lung appeal, you may file in any Court of Appeals covering any state in which you **worked** as a miner). Listed on the back of this page are the twelve Courts of Appeals and the states they cover. You should identify the court covering the state of injury (including all states of mine employment for black lung claims) and file your petition with that court. If you have questions about your case, call the Clerk of the court at the number shown on the back of this page. If you appeal directly to the Court of Appeals you may not later get reconsideration by the Board. However, if you seek Board reconsideration you may later appeal the Board's ruling on reconsideration to the Court of Appeals.

IF YOU HAVE ANY QUESTIONS ABOUT THE PROCEDURES TO BE FOLLOWED IN YOUR CASE, CALL THE OFFICE OF THE CLERK OF THE BOARD, BENEFITS REVIEW BOARD, (202) 633-7503.

RECEIVED SEP 16 1996

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APPENDIX D

U.S. DEPARTMENT OF LABOR
Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

BRB No. 95-1161 OCT 25 1996
Case No. 83-LHC-2933
OWCP No. 8-65149

ROBERT C. MORRIS	)
	)
Claimant-Petitioner	)
v.	)
	) DATE ISSUED:
COOPER STEVEDORING	) OCT 22 1996
COMPANY	)
and	)
THE INSURANCE	)
COMPANY OF AMERICA	)
	)
Employer/Carrier-	)
Respondents	)

ORDER

The Board has received claimant's motion requesting reconsideration of the notice issued by the Board dated September 12, 1996, advising that as a result of Public Law 104-134 this claim is administratively affirmed.

Public Law 104-134, enacted April 26, 1996, provides that no funds made available by this Act may be used by the Secretary of Labor after September 12, 1996, to review a decision under the Longshore and Harbor Workers;

Compensation Act (33 U.S.C. §901, et seq.) that has been appealed and that has been pending before the Benefits Review Board for more than twelve (12) months.

In this request for reconsideration, claimant does not challenge the determination that as of September 12, 1996, this case had been appealed and had been pending before the Benefits Review Board for more than twelve (12) months. The Board, therefore, does not have authority to further review this case. Consequently, claimant's request for reconsideration is denied. Further review of this determination, if desired, is properly sought by obtaining review with the appropriate United States Court of Appeals.

By Order of the Board:

/s/ Thomas O. Shepherd, Jr. /MB
Thomas O. Shepherd, Jr.
Clerk of the Board

CERTIFICATE OF SERVICE

95-1161 Robert C. Morris v. Cooper Stevedoring Company, The Insurance Company of America (Case No. 83-LHCA-2933) (OWCP No. 08-0065149)

I certify that the parties below were served this day.

OCT 22 1996
DATE
Clerk of the Board /MHS

/s/ Thomas O. Shepherd, Jr.
Thomas O. Shepherd, Jr.

Michael N. Cokins,Esq.
5225 Allendale
HOUSTON, TX 77017
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Robert C. Morris
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OWCP-Longshore Division
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Judge Everette E. Thomas
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Office of Administrative Law Judges
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Judge Kerry Anzalone
U.S. Department of Labor
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METAIRIE, LA 70005

NOTICE OF APPEAL RIGHTS

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If you seek RECONSIDERATION by this Board (that is, if you want the Board to reconsider its decision), you must submit to the Board a written Motion for Reconsideration within **30 DAYS OF THE DATE STAMPED ON THE FRONT OF THIS DECISION.** Your motion should identify any error you find in the Board's opinion and state the reasons you believe warrant further consideration of your case. If you file a timely motion for reconsideration, you will have sixty (60) days from issuance of the Board's decision on reconsideration to file an appeal with a Court of Appeals, as set forth below.

Alternatively, if you wish to APPEAL to a United States Court of Appeals, you must insure that a petition for review is received by **THE APPROPRIATE COURT (NOT THIS BOARD) WITHIN SIXTY (60) DAYS OF THE DATE STAMPED ON THE FRONT OF THIS DECISION.** The petition for review should contain the case number and the date of the Board's decision. The petition should be sent to the Court of Appeals which covers the state in which the

employee's injury occurred. In a black lung claim, any state in which the miner had coal mine employment may be considered the state in which the injury occurred (i.e., for a black lung appeal, you may file in any Court of Appeals covering any state in which you **worked** as a miner). Listed on the back of this page are the twelve Courts of Appeals and the states they cover. You should identify the court covering the state of injury (including all states of mine employment for black lung claims) and file your petition with that court. If you have questions about your case, call the clerk of the court at the number shown on the back of this page. If you appeal directly to the Court of Appeals you may not later get reconsideration by the Board. However, if you seek Board reconsideration you may later appeal the Board's ruling on reconsideration to the Court of Appeals.

IF YOU HAVE ANY QUESTIONS ABOUT THE PROCEDURES TO BE FOLLOWED IN YOUR CASE, CALL THE OFFICE OF THE CLERK OF THE BOARD, BENEFITS REVIEW BOARD, (202) 633-7503

RECEIVED SEP 16 1996

APPENDIX E

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injury or kill himself of another.

REVIEW OF COMPENSATION ORDER

Sec. 21. (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b)(1) There is hereby established a Benefits Review Board which shall be composed of *five* members appointed by the Secretary from among individuals who are especially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman. *The Chairman shall have the authority, as delegated by the Secretary, to exercise all administrative functions necessary to operate the Board.*

(2) For the purpose of carrying out its functions under this Act, *three* members of the Board shall constitute a quorum and official action can be taken only on the affirmative vote of at least *three* members.

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of

employees under this Act and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

(4) The Board may, on its own motion or at the request of the Secretary, remand a case to the hearing examiner for further appropriate action. The consent of the parties in interest shall not be a prerequisite to a remand by the Board.

(5) *Notwithstanding paragraphs (1) through (4), upon application of the Chairman of the Board, the Secretary may designate up to four Department of Labor administrative law judges to serve on the Board temporarily, for not more than one year. The Board is authorized to delegate to panels of three members any or all of the powers which the Board may exercise. Each such panel shall have no more than one temporary member. Two members shall constitute a quorum of a panel. Official adjudicative action may be taken only on the affirmative vote of at least two members of a panel. Any party aggrieved by a decision of a panel of the Board may within thirty days after the date of entry of the decision, petition the entire permanent Board for review of the panel's decision. Upon affirmative vote of the majority of the permanent members of the Board, the petition shall be granted. The Board shall amend its Rules of Practice to conform with this paragraph. Temporary members, while serving as members of the Board, shall be compensated at the same rate of compensation as regular members.*

(c) Any person adversely affected or aggrieved by a final

order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of title 28, United States Code. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings, may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

(d) If any employer of his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the United States District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to

comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process mandatory or otherwise to enjoin upon such person and his officers and agents compliance with the order.

(e) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 18.

APPEARANCE OF ATTORNEYS FOR SECRETARY, DEPUTY COMMISSIONER, ON BOARD

Sec. 21a. Attorneys appointed by the Secretary shall represent the Secretary, the deputy commissioner, or the Board in any court proceedings under section 21 or other provisions of this Act except for proceedings in the Supreme Court of the United States.

(2)

FILED
AUG 24 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-156

In The

Supreme Court of the United States

October Term, 1997

ROBERT MORRIS,

Petitioner,

v.

COOPER STEVEDORING COMPANY AND INSURANCE COMPANY OF NORTH AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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Counsel of Record

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Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

24 pp

QUESTION PRESENTED FOR REVIEW

Petitioner filed a claim for benefits under the Longshore and Harbor Workers' Compensation Act and that claim was denied after a hearing before an Administrative Law Judge. Petitioner appealed the ALJ's decision to the Benefits Review Board and the ALJ's decision was affirmed by operation of a congressional statute, which expressly stated that the ALJ's decision was the Board's final order for purposes of appeal to the federal Courts of Appeals. Another federal statute required the Petitioner to file an appeal to the appropriate federal Court of Appeals within 60 days after the Board's final order. When the Petitioner failed to file his appeal within 60 days of the statutory affirmance, did the Court of Appeals properly dismiss the appeal for lack of jurisdiction?

LIST OF ALL PARTIES

The parties to this case are Robert Morris, the Petitioner, and Cooper Stevedoring Company and Insurance Company of North America, Respondents. As required by Rule 29.6 of this Court, the Respondents provide the following information:

(1) Cooper Stevedoring Company was succeeded by Cooper/T. Smith Stevedoring Co., Inc. The parent corporation of Cooper/T. Smith Stevedoring Co., Inc. is Cooper/T. Smith Corporation. The following are non-wholly owned subsidiaries of Cooper/T. Smith Stevedoring Co., Inc.: Tadco, Inc.; Husky Terminal and Stevedoring, Inc.; Gulf Services, Inc.; Gateway Terminals, Inc.; Transbay Container Terminals; KIC Acquisition Co.; and Cooper/Servport Ltda.

(2) The parent corporation of Insurance Company of North America is INA Holdings Corporation. Insurance Company of North America has no subsidiaries that are non-wholly owned.

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STATUTES:

The Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 1996 U.S.C.C.A.N. (110 Stat.) 1321, 1321-219, *amended by* Act of May 2, 1996, Pub. L. No. 104-140, 1996 U.S.C.C.A.N. (110 Stat.) 1327 ..... *passim*

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OPINIONS BELOW

None of the opinions and judgments delivered by the courts below have been reported. A copy of the Notice from the Clerk of the Benefits Review Board, dated September 12, 1996, affirming the ALJ's denial of benefits, is reprinted in Appendix C to the Petition for Writ of Certiorari (p. 3a). A copy of the Order of the Benefits Review Board, dated October 22, 1996, denying the Petitioner's request for reconsideration, is reprinted in Appendix D to the Petition for Writ of Certiorari (p. 9a). A copy of the Order of the United States Court of Appeals for the Fifth Circuit, filed March 18, 1998, granting Respondents' motion to dismiss the appeal, is reprinted in Appendix A to the Petition for Writ of Certiorari (p. 1a). A copy of the Order of the United States Court of Appeals for the Fifth Circuit, filed April 27, 1998, denying Petitioner's motion for reconsideration, is reprinted in Appendix B to the Petition for Writ of Certiorari (p. 2a).

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

The statutes and regulations involved in this case and their pertinent text are as follows:

(1) The Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 1996 U.S.C.C.A.N. (110 Stat.) 1321, 1321-219, *amended by* Act of May 2, 1996, Pub. L. No. 104-140, 1996 U.S.C.C.A.N. (110 Stat.) 1327:

Provided further, That no funds made available by this Act may be used by the Secretary of Labor after September 12, 1996, to review a decision under the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 901 et seq.) that has been appealed and that has been pending before the Benefits Review Board for more than 12 months, except as otherwise specified herein: *Provided further,* That any such decision pending a review by the Benefits Review Board for more than one year shall, if not acted upon by the Board before September 12, 1996, be considered affirmed by the Benefits Review Board on that date, and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeals: *Provided further,* That beginning on September 13, 1996, the Benefits Review Board shall make a decision on an appeal of a decision under the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 901 et seq.) not later than 1 year after the date the appeal to the Benefits Review Board was filed; however, if the Benefits Review Board fails to make a decision within the 1-year period, the decision under review shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeals.

(2) 33 U.S.C. § 921(c).

This statute is reproduced in Appendix E to the Petition for Writ of Certiorari (pp. 15a, 16a-17a).

(3) 20 C.F.R. § 802.403:

§ 802.403 Issuance of decisions; service.

(a) The Board shall issue written decisions as expeditiously as possible after the completion of review proceedings before the Board. The transmittal of the decision of the Board shall indicate the availability of judicial review of the decision under section 21(c) of the LHWCA when appropriate.

(b) The original of the decision shall be filed with the Clerk of the Board. A copy of the Board's decision shall be sent by certified mail or otherwise presented to all parties to the appeal and the Director. The record on appeal, together with a transcript of any oral proceedings, any briefs or other papers filed with the Board, and a copy of the decision shall be returned to the appropriate district director for filing.

(4) 20 C.F.R. § 802.407:

§ 802.407 Reconsideration of Board decisions.

(a) Any party-in-interest may, within 30 days from the filing of a decision or non-interlocutory order by a panel or the Board pursuant to § 802.403(b), request reconsideration of such decision by those members who rendered the decision. The panel of members who heard and decided the appeal will rule on the motion for reconsideration. If any member of the original panel is unavailable, the Chairman shall designate a new panel member.

STATEMENT OF THE CASE

This appeal involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950. On June 24, 1980, while engaged in work as a longshoreman at the Port of Houston, the Petitioner sustained an injury to his back. He filed a claim for benefits under the LHWCA, and that claim was tried before an Administrative Law Judge, who rendered a decision awarding specified benefits to the Petitioner. One of the issues litigated at the formal hearing before the ALJ was the calculation of the Petitioner's average weekly wage at the time of his injury. However, the Petitioner was dissatisfied with the ALJ's determination of that issue, and he appealed the determination first to the Benefits Review Board and then to the United States Court of Appeals for the Fifth Circuit, both of which affirmed the ALJ's findings and calculation.

Remaining dissatisfied with the calculation of his average weekly wage, the Petitioner attempted to do indirectly what he had been unable to do directly. He requested a modification of the ALJ's decision, pursuant to Section 22 of the LHWCA. When the District Director of the Office of Workers' Compensation Programs denied the Petitioner's request for modification, the Petitioner then had the request for a modification referred to a formal hearing before another ALJ. The second ALJ held a formal hearing on the modification request and issued a decision and order denying that request.

In mid-March 1995, the Petitioner filed an appeal of the second ALJ's decision and order to the Benefits Review Board. Over a year later, on September 12, 1996,

the ALJ's decision and order was statutorily affirmed by operation of Public Law 104-134, and became the final order of the Board for purposes of appeal. As a result, on that date the Clerk of the Board issued a Notice to the parties stating that the ALJ's decision was affirmed under Public Law 104-134. (App. C, p. 3a).[1] Despite the Notice's declaration that the Board's order was final, despite the express pronouncement of Public Law 104-134 that the ALJ's decision and order was the Board's final order for purposes of appellate review, and despite the fact that the purpose and effect of Public Law 104-134 were to prevent further review by the Board, the Petitioner filed a motion for reconsideration of the Board's order. In an Order dated October 22, 1996, the Board explained that it did not have authority to conduct any further review of the case and therefore denied the request for reconsideration. (App. D, p. 9a). Although Section 21 of the LHWCA required the Petitioner to file an appeal of the Board's final order within 60 days after the order was issued, the Petitioner delayed until December 16, 1996, over 90 days after September 12, 1996, to file his petition for review, seeking once again to have the United States Court of Appeals for the Fifth Circuit review his average weekly wage calculation.

The Respondents moved the Court of Appeals to dismiss the Petitioner's appeal, on the ground that the petition for review was not timely filed and therefore the Court lacked jurisdiction. The Court granted the motion to dismiss (App. A, p. 1a), whereupon the Petitioner filed

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[1] All Appendix references in this Brief are to the Appendices in the Petition for Writ of Certiorari.

a motion for reconsideration, which the Court denied (App. B, p. 2a). The Petitioner now seeks review by this Court.

REASONS FOR DENYING THE PETITION

The Petition for Writ of Certiorari should be denied because the Court of Appeals properly dismissed the Petitioner's appeal. The Petitioner's petition for review to the Court of Appeals was not timely filed and as a result the Court did not have jurisdiction over the appeal. In addition, the Petition for Writ of Certiorari should be denied because the Petitioner has not demonstrated a compelling reason for the Court to exercise its discretionary review of this case. The Petitioner has not demonstrated that this case involves an important federal question or similar compelling matter requiring this Court's attention. *See* Sup. Ct. R. 10. In fact, the Petition for Writ of Certiorari does not contain even a single case citation.

Section 21(c) of the LHWCA sets forth the procedure by which a petitioner may obtain a Court of Appeals' review of an order issued by the Benefits Review Board:

> **(c) Court of appeals; jurisdiction; persons entitled to review; petition; record; determination and enforcement; service of process; stay of payments**
>
> Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such

> court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside.

33 U.S.C. § 921(c). All the Courts of Appeals that have examined this provision have held that a Court of Appeals does not have jurisdiction over the appeal if the petition for review is not filed within sixty days of the issuance of the Board's final order. *See, e.g., Felt v. Director, OWCP*, 11 F.3d 951, 952 (9th Cir. 1993); *Adkins v. Director, OWCP*, 889 F.2d 1360, 1361-63 (4th Cir. 1989); *Clay v. Director, OWCP*, 748 F.2d 501, 503 (8th Cir. 1984); *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 42-44 (2d Cir. 1976), *aff'd on other grounds sub nom. Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977). These courts recognize that the Court of Appeals "is a court of limited jurisdiction," and "may review decisions of the Benefits Review Board only when appeals are brought to [it] under the conditions and within the time specified by statute." *Adkins*, 889 F.2d at 1361.

The Board's final order for purposes of appeal was issued on September 12, 1996. The Omnibus Consolidated Rescissions and Appropriations Act of 1996 expressly curtailed the Benefits Review Board's authority to review an ALJ's decision under the LHWCA:

> [N]o funds made available by this Act may be used by the Secretary of Labor after September 12, 1996, to review a decision under the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 901 et seq.) that has been appealed and that has been pending before the Benefits Review Board for more than 12 months, except as otherwise specified herein: *Provided further,*

> *That any such decision pending a review by the Benefits Review Board for more than one year shall, if not acted upon by the Board before September 12, 1996, be considered affirmed by the Benefits Review Board on that date, and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeals. . . .*

Pub. L. No. 104-134, 1996 U.S.C.C.A.N. (110 Stat.) 1321, 1321-219, *amended by* Act of May 2, 1996, Pub. L. No. 104-140, 1996 U.S.C.C.A.N. (110 Stat.) 1327 (emphasis added). The Appropriations Act is, in effect, an amendment to the LHWCA, addressing the finality of decisions under the LHWCA and altering its provisions. *See Washington Metro. Area Transit Auth. v. Beynum,* 145 F.3d 371, 373 (D.C. Cir. 1998). Thus, by the clear pronouncement of the Appropriations Act, the Benefits Review Board had no authority after September 12, 1996 to review a decision of an ALJ that had been pending on appeal for more than one year. If, as of September 12, 1996, an ALJ's decision was pending before the Board for over one year, it was deemed automatically affirmed by the Board and was "considered the final order of the Board for purposes of obtaining a review in the United States courts of appeals." *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 159 n.2 (5th Cir. 1997); *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 315 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1563 (1998). In fact, in the very recent case of *Director, OWCP, v. Sun Ship, Inc.*, No. 96-3648, 1998 WL 423785 (3d Cir. July 29, 1998), the Court of Appeals held that any action taken by the Benefits Review Board after the case has been statutorily affirmed under the Appropriations Act is a nullity.

In the present case, the Petitioner filed his appeal with the Benefits Review Board in March 1995, with respect to the second ALJ's decision and order. However, as of September 12, 1996, approximately a year and a half after the appeal was filed, the Board had taken no action on the appeal. Consequently, the second ALJ's decision and order was deemed affirmed as of September 12, 1996 by Public Law 104-134 and was considered the final order of the Board for purposes of an appeal to the United States Court of Appeals for the Fifth Circuit. The Clerk of the Board issued a Notice to all the parties on September 12, 1996, which stated that the ALJ's decision was statutorily affirmed and was the final order of the Board for purposes of an appeal. (App. C, p. 3a).

Although the final order of the Board was issued on September 12, 1996, the Petitioner did not file his petition for review of that order within 60 days of that date. He did not file his petition for review until December 16, 1996, which was over 90 days after the Board's final order was issued. Thus, the Petitioner's petition for review was untimely, the Court of Appeals lacked jurisdiction over the appeal, and the appeal was properly dismissed.

In *Seaward Marine Services, Inc. v. Director, OWCP*, No. 96-2661, 131 F.3d 136 (Table), 1997 U.S. App. LEXIS 34138 (Text) (4th Cir. Dec. 4, 1997), an ALJ awarded benefits to a claimant under the LHWCA and denied Seaward Marine's application for relief under Section 8(f) of that Act. Seaward Marine then appealed the decision to the Benefits Review Board. Because the appeal had been pending before the Board for over one year as of September 12, 1996, the Benefits Review Board cited Public Law 104-134 and "informed the parties that the ALJ's decision

had been effectively affirmed by the Benefits Review Board on September 12, 1996, for purposes of their rights to obtain review in [the Fourth Circuit Court of Appeals]." *Id.* at *2. Although the Benefits Review Board issued its notice of affirmance on September 12, 1996 and the 60-day appeal period was to expire on November 12, 1996, Seaward Marine did not file its petition for review with the Fourth Circuit until November 13, 1996, "one day outside the applicable sixty-day period." *Id.* at *3. Consequently, the Fourth Circuit held that the petition for review was filed untimely and dismissed the appeal for lack of jurisdiction. *Id.*; *see also Stevedoring Servs. of Am. v. Director, OWCP*, 29 F.3d 513 (9th Cir. 1994) (petition for review filed over 90 days after the issuance of the Board's order was untimely, and the court lacked jurisdiction); *Felt v. Director, OWCP*, 11 F.3d 951 (9th Cir. 1993) (petition for review filed 67 days after the issuance of the Board's order was untimely, and the court lacked jurisdiction); *Adkins v. Director, OWCP*, 889 F.2d 1360 (4th Cir. 1989) (petition for review filed over 60 days after the issuance of the Board's order was untimely, and the court lacked jurisdiction); *Brown v. Director, OWCP*, 864 F.2d 120 (11th Cir. 1989) (petition for review filed 61 days after the issuance of the Board's order was untimely, and the court lacked jurisdiction); *Danko v. Director, OWCP*, 846 F.2d 366 (6th Cir. 1988) (petition for review file stamped 67 days after the issuance of the Board's order was untimely, and the court lacked jurisdiction); *Clay v. Director, OWCP*, 748 F.2d 501 (8th Cir. 1984) (petition for review filed 63 days after the issuance of the Board's order was untimely, and the court lacked jurisdiction); *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 42-44 (2d Cir. 1976), *aff'd on other grounds sub nom. Northeast Marine Terminal Co. v.*

Caputo, 432 U.S. 249 (1977) (petition for review filed over 90 days after the issuance of the Board's order was untimely, and the court lacked jurisdiction). These cases all demonstrate that where, as here, a petitioner does not file his petition for review within 60 days of the Board's final order, the Court of Appeals lacks jurisdiction over the appeal, and the appeal is properly dismissed.

In his Petition for Writ of Certiorari, the Petitioner contends that his appeal to the Court of Appeals was timely filed because the petition for review was filed within 60 days of the Benefits Review Board's Order denying his motion for reconsideration. In other words, he contends that the motion for reconsideration filed with the Board extended the time in which he could file his appeal. However, this contention is meritless. A motion for reconsideration was neither authorized nor permitted under the applicable law and could not extend the appellate deadline in this case.

As noted above, Public Law No. 104-134 amends the LHWCA and alters the provisions of the LHWCA with respect to the finality of decisions. Public Law No. 104-134 does not authorize a motion for reconsideration of the Board's September 12, 1996 order, and in fact the allowance of a motion for reconsideration would flout the very language and purpose of Public Law No. 104-134. That law, which the Petitioner neglects to discuss in the Petition for Writ of Certiorari, clearly anticipates that the September 12, 1996 statutory affirmance will be the final agency action for purposes of an appeal. The law expressly states that any ALJ decision "pending a review by the Benefits Review Board for more than one year shall, if not acted upon by the Board before September 12,

1996, *be considered affirmed by the Benefits Review Board on that date, and shall be considered the final order of the Board for purposes of obtaining a review in the United States courts of appeals.*" The statute could hardly be more explicit. With regard to this case, it requires that the second ALJ's decision be considered affirmed by the Board on September 12, 1996 and that the ALJ's decision be considered the Board's final order *for purposes of appeal*. The Notice of the Clerk of the Board that was issued to all parties on September 12, 1996 also expressly states that the statutory affirmance is the final order of the Board for purposes of an appeal. (App. C, p. 3a). Moreover, the Courts of Appeals have given effect to this statute and have recognized that the statutory affirmance is the "final order of the Board for purposes of obtaining review" in the Courts of Appeals. *See Continental Terminals v. Director, OWCP*, No. 96-4175, 125 F.3d 843 (Table), 1997 U.S. App. LEXIS 28523 (Text), *2 (2d Cir. Oct. 9, 1997); *see also Hall v. Consolidated Employment Sys., Inc.*, 139 F.3d 1025, 1028 n.2 (5th Cir. 1998) (stating that cases pending before the Board for more than a year as of September 12, 1996 "are required to be considered affirmed and final on September 12, 1996 for purposes of judicial review"); *Jones Stevedoring Co. v. Director, OWCP*, 133 F.3d 683, 687 (9th Cir. 1997) (stating that under Public Law 104-134 "the ALJ's decision is deemed the final decision of the Benefits Review Board for purposes of finality" and thus "the ALJ's decision is the final agency decision"). Thus, Public Law No. 104-134 contemplates that the Board's final order in this case was issued on September 12, 1996 and that there would be no further consideration by the Board.

A motion for reconsideration and an extension of time for filing an appeal are also inconsistent with the stated purpose of Public Law No. 104-134. Although the statute describes itself as an "Act making appropriations for fiscal year 1996," it also had as its purpose the reduction of funding to certain government agencies, apparently to help achieve a balanced budget. Public Law No. 104-134, 1996 U.S.C.C.A.N. (110 stat.) 1321, 1321. As a result, the statute expressly reduced the funding available to the Benefits Review Board: "[N]o funds made available by this Act may be used by the Secretary of Labor after September 12, 1996, to review a decision under the Longshore and Harbor Workers' Compensation Act (33 U.S.C. 901 et seq.) that has been appealed and that has been pending before the Benefits Review Board for more than 12 months." In other words, the purpose of Public Law No. 104-134 was specifically to prohibit the Board from taking any action on a case after September 12, 1996 if the case had been pending for more than one year. A motion for reconsideration of such a case requests the Board to engage in the very review that Public Law 104-134 was intended to prohibit. In fact, the recent case of *Director, OWCP, v. Sun Ship, Inc.*, No. 96-3648, 1998 WL 423785, *4 (3d Cir. July 29, 1998), has recognized the purpose and effect of the Appropriations Act and has specifically held that an action taken by the Board after a statutory affirmance under the Appropriations Act is a nullity.

In the present case, the Benefits Review Board itself recognized that Public Law No. 104-134, and the purpose underlying the law, does not permit a motion for reconsideration. In its Order denying the Petitioner's motion for reconsideration, the Board explained that it did "not

have authority to further review this case." (App. D, pp. 9a, 10a). Thus, a request for reconsideration was inappropriate under the circumstances of this case and did not provide the basis for extending the time for appellate review.

The Petitioner's argument that a motion for reconsideration should extend the time for filing an appeal is apparently based at least in part on concerns of judicial economy. The argument is that the time for filing an appeal should not begin to run while the administrative agency may still take action to address those issues that may be raised on appeal to the Courts of Appeals. However, such concerns of judicial economy are not implicated in the present case, because Public Law No. 104-134 requires statutory affirmance of the ALJ's decision and expressly prohibits any further action by the Board. Thus, there can be no reconsideration and there is no need to extend the time for filing an appeal.

Petitioner contends that his motion for reconsideration filed with the Board was properly filed under 20 C.F.R. § 802.407(a). However, that regulation does not and cannot authorize a motion for reconsideration under the facts of this case. Section 802.407 states:

> (a) Any party-in-interest may, within 30 days *from the filing of a decision or non-interlocutory order by a panel or the Board pursuant to § 802.403(b),* request reconsideration of such decision by those members who rendered the decision. The panel of members who heard and decided the appeal will rule on the motion for reconsideration. If any

> member of the original panel is unavailable, the Chairman shall designate a new panel member.

20 C.F.R. § 802.407(a) (emphasis added). As Section 802.407 specifically refers to Section 802.403, it is necessary to consider the pertinent language of that Section as well:

> (a) The Board shall issue written decisions as expeditiously as possible after the completion of review proceedings before the Board. The transmittal of the decision of the Board shall indicate the availability of judicial review of the decision under Section 21(c) of the Longshore and Harbor Workers' Compensation Act when appropriate.
>
> (b) The original of the decision shall be filed with the Clerk of the Board. A copy of the Board's decision shall be sent by certified mail or otherwise presented to all parties to the appeal and the Director. The record on appeal, together with a transcript of any oral proceedings, any briefs or other papers filed with the Board, and a copy of the decision shall be returned to the appropriate district director for filing.

20 C.F.R. § 802.403. These regulations clearly reflect that a motion for reconsideration is authorized only where the members of the Board have rendered a written "decision" on the substantive arguments after reviewing the case. However, in the present case, the Administrative Law Judge's decision denying the modification was affirmed by operation of Public Law 104-134, without any substantive review by the Board and without the rendering or

issuance of any Board decision. Instead, the Clerk of the Board merely sent a Notice to the parties informing them that the Administrative Law Judge's decision was statutorily "affirmed by the Board and [was] considered the final order of the Board for purposes of obtaining a review in the United States courts of appeal." (App. C, p. 3a). There were no panel members who heard and decided the appeal. Thus, Section 802.407(a)'s requirements that the request for reconsideration be directed to "those members who rendered the decision" and that "[t]he panel of members who heard and decided the appeal . . . rule on the motion for reconsideration" make no sense under the facts of this case. In fact, the Board referred to the initial affirmance not as a "decision," but as a "notice." (App. D, p. 9a).

The fact that Section 802.407 does not authorize a motion for reconsideration under the facts of this case is entirely consistent with the language and purpose of Public Law 104-134. As previously mentioned, the Appropriations Act is concerned with curtailing certain government funding, including the elimination of certain funding for the Benefits Review Board. The Act contemplates that the review process before the Board will end as of September 12, 1996. It does not contemplate that thereafter the Board may take any further action on the case, such as a reconsideration.

Even if, for the sake of argument, Section 802.407 were read to purportedly authorize a motion for reconsideration of the statutory affirmance in this case, that Section would be invalid because it would directly conflict with Public Law No. 104-134, a federal statute. As discussed above, the regulation's permission of a motion

for reconsideration would contravene the language and purpose of Public Law No. 104-134. *See, e.g., Brown v. Gardner*, 513 U.S. 115 (1994) (holding a regulation of the Department of Veteran Affairs invalid because it was inconsistent with a federal statute).

Consequently, Section 802.407 did not and could not authorize the Petitioner to file a motion for reconsideration under the facts of this case. Furthermore, that Section did not and could not authorize any extension of time for the Petitioner to file his appeal to the Court of Appeals.

Finally, the Petitioner argues that his motion for reconsideration was somehow authorized and the appeal deadline was thereby extended because he followed the procedures outlined in the pre-printed forms (Notice of Appeal Rights) that were attached to the Board's September 12, 1996 Notice of affirmance and October 22, 1996 Order denying reconsideration. In fact, however, the Petitioner did not follow the instructions of the Clerk of the Board. The Board's September 12, 1996 Notice stated that under Public Law 104-134 the ALJ's "decision pending review by the Benefits Review Board [was] considered the final order of the Board for purposes of obtaining a review in the United States courts of appeal." (App. C, p. 3a). Moreover, in the Notice, the Clerk of the Board expressly stated: "Attached please find an outline of *the procedures for appealing to the courts of appeal.*" (*Id.*) (emphasis added). Thus, in the brief Notice, the Clerk repeatedly indicated that the Petitioner was required to file an appeal directly to the United States Court of Appeals. The pre-printed attachments to the Clerk's Notice were forms that simply contained the instructions on how to proceed with an appeal to the Court of

Appeals. Those forms contained a complete listing of all the federal courts of appeals, their addresses and telephone numbers, and the states over which each court exercised jurisdiction.[2] In addition, the Notice of Appeal Rights attached to the Board's September 12, 1996 Notice of affirmance clearly explained that in an appeal to the Court of Appeals, the petition for review had to be received by the Court within 60 days of September 12, 1996.

Despite these instructions, the Petitioner did not follow the appropriate procedure of appealing to the Court of Appeals within 60 days of the September 12, 1996 Notice, but instead made an unauthorized motion for reconsideration. Furthermore, even after the unauthorized motion for reconsideration was denied, the Petitioner could have timely filed an appeal. The Board's Order denying reconsideration was issued October 22, 1996, a little over one month after the September 12, 1996 affirmance. In that Order, the Board explained that the ALJ's decision had been statutorily affirmed, that a motion for reconsideration was impermissible, and that the Board had no authority to review the case. Nevertheless, the Board stated that the Petitioner could still seek further review with the Court of Appeals. However, instead of quickly filing the petition for review, the

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[2] The lists, which are located on the back of the Notices of Appeal Rights, were not reproduced in Appendices C and D of the Petition for Writ of Certiorari (App. C, pp. 7a-8a; App. D, pp. 13a-14a). Because the lists merely contain well-known factual information, they have not been reproduced as an Appendix to this Brief.

Petitioner delayed approximately another 55 days before filing an untimely petition for review.

The case of *Bolling v. Director, OWCP*, 823 F.2d 165 (6th Cir. 1987), is analogous to the present case and is instructive on the issue of the Court of Appeals' lack of jurisdiction. In that case, the Court of Appeals held that where a petitioner did not timely request reconsideration by the Benefits Review Board, the Motion for Reconsideration "did not toll the time for filing a petition for review in this court." *Id.* at 166. As a result, the Court held that a petition for review filed over 60 days after the Board's original order was untimely and the Court lacked jurisdiction to consider the appeal.

Even if the Petitioner were somehow misled by the attachments to the Board's September 12, 1996 Notice or October 22, 1996 Order, the Courts have uniformly held that such a circumstance does not extend or toll the applicable time period for filing the appeal. They have held that "[t]he policy requiring that appeals be timely taken is so strong that ministerial failures by a clerk cannot be allowed to overcome it." *See, e.g., Stevedoring Servs. of Am. v. Director, OWCP*, 29 F.3d 513, 516 (9th Cir. 1994). Moreover, the courts have held that the doctrines of equitable tolling and excusable neglect are likewise unavailable to extend the period for filing the petition for review. *See, e.g., Felt v. Director, OWCP*, 11 F.3d 951, 952-53 (9th Cir. 1993); *Cooley v. Director, OWCP*, 895 F.2d 1301, 1303 (11th Cir. 1990); *Shendock v. Director, OWCP*, 893 F.2d 1458, 1466 (3d Cir.) (en banc), *cert. denied*, 498 U.S. 826 (1990).

CONCLUSION

In sum, Public Law 104-134 mandated that the ALJ's decision be affirmed as of September 12, 1996 and that the statutory affirmance be the Board's final order for purposes of appeal to the United States Court of Appeals. A motion for reconsideration was neither authorized by Public Law No. 104-134 nor consistent with the language or purpose of that statute, and such a motion could not extend the time for filing an appeal. Although the Petitioner was required to file his petition for review with the Fifth Circuit within 60 days of September 12, 1996, he did not comply with the statutory requirements. Because the Court of Appeals properly determined that it lacked jurisdiction over the appeal and because the Petitioner has failed to demonstrate an important federal question or other compelling interest warranting this Court's exercise of discretionary review, the Petition for Writ of Certiorari should be denied.

For the foregoing reasons, the Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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